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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY DAVID BULLARD,

Defendant and Appellant.

F062766

(Super. Ct. No. MF50861B)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Merced County. Brian L. McCabe, Judge.

Hayes H. Gable, III, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Harry Joseph Colombo, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Wiseman, Acting P.J., Levy, J. and Franson, J.

### **STATEMENT OF THE CASE**

Appellant Larry David Bullard, and codefendant Michael Allen Foster (Foster) were charged with grand theft of gold dust, amalgam or quicksilver under Penal Code section 487d.<sup>1</sup> Further, it was alleged that Bullard had served a prior prison term for a felony conviction (§ 667.5(b)). Following a two-day trial, the jury found appellant guilty on March 20, 2011. Thereafter, the trial court found the prior felony allegation enhancement true.

On May 20, 2011, appellant was ordered to serve the middle term of two years in state prison, but sentence was suspended for three years, and appellant was placed on probation and ordered to serve nine months in the county jail. Additionally, appellant was ordered to pay various fines and fees.

Appellant contends that the trial court erred when it failed to instruct on the elements of attempt. We find no prejudicial error and affirm.

### **STATEMENT OF FACTS**

#### **Prosecution Case**

At 12:52 a.m. on December 21, 2008, Merced County Deputy Sheriff Dillon Buessing (Buessing) was dispatched to Calaveras Materials (Calaveras), a gold harvesting plant in Merced County, in response to the triggering of a silent alarm at the plant. The plant occupies 600 acres and is a “[r]ock, sand, and gravel, construction materials” business. In the process of sorting the rock and gravel, the company also collects gold dust. Calaveras is located in a remote and rural part of the county, and on this particular night, it was foggy and the visibility was poor.

Approximately 15 to 20 minutes after Buessing arrived at Calaveras, the foreman, Jeremy Boland (Boland), arrived. Boland directed Buessing to the area where the alarm

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<sup>1</sup> All further statutory references are to the Penal Code.

had been tripped, which was the gold flume. The gold flume is where the gold dust is extracted from the sand. Buessing described the gold flume as “a big, metal steel building” with “a staircase that leads up to it.” Inside the gold flume is the sluice, which is where the sand and gold dust was collected. The sluice is surrounded by a cage.

Buessing and Boland walked up the staircase and, at the top of the flume, discovered two adults lying down in the flume shadows. Both men were dressed in all black --black beanies, black gloves, and black clothes. Buessing ordered the men out at gunpoint and detained them. The men were later identified by Buessing as appellant and Foster. Boland recognized both men -- he had worked with Foster and recognized appellant through previous encounters -- but neither had permission to be at Calaveras that night.

Near where appellant and Foster were found, Buessing and Boland discovered a red industrial Shop-Vac and seven canvas bags. The Shop-Vac had a long hose attached to it, which led to a pile of sand on the ground near inside the sluice. Later, Buessing discovered a two-wheeled cart behind another building at the plant, and pointed it out to Boland. No vehicles were found in the area. Appellant and Foster were arrested.

No sand or gold dust was found in any of the bags, the Shop-Vac, the cart, or on the men’s clothing. Boland testified that the Shop-Vac was not on and he could not remember whether it was plugged in, but did recall seeing an extension cord with the Shop-Vac. Although Boland testified that the Shop-Vac was right next to appellant and Foster, he conceded that there were multiple items in the area, and that he did not see either of them touch the Shop-Vac.

Boland testified that he had last been near the gold flume the day before the alarm was tripped, and stated that he did not recall seeing a Shop-Vac when he was last in that area. Boland did, however, state his belief that the Shop-Vac could be used to suck sand out of the cage that surrounds the sluice.

Dunlavy Enterprises performs gold recovery and other services for gravel plants in California. Calaveras was Dunlavy Enterprises' client until 2009, and at the time of the incident, Marsha Dunlavy (Dunlavy) was the treasurer and secretary. During this time, she was responsible for all purchases made by Dunlavy Enterprises. Dunlavy described Calaveras as a "very valuable pit location" and that it was one of Dunlavy Enterprises' "better plants." Dunlavy also testified that she was not aware of the use of a Shop-Vac or two-wheeled cart by her company, nor did she recall purchasing a Shop-Vac for use at Calaveras. However, Dunlavy conceded that the employees at that site used a variety of hand-held equipment, and could not say with absolute certainty that a Shop-Vac was never at the site.

#### Defense Case

Foster testified that he had worked for Calaveras, but stopped working there in April 2007 after becoming ill. On the evening of December 21, 2008, Foster and appellant went over to Foster's brother's house, near Turlock, to ask Foster's brother to help them do some concrete work. At some point between 9:00 and 10:00 p.m., Foster and appellant left to return home to Chowchilla, California. According to Foster, he and appellant chose to take back roads instead of Highway 99 because they were used to taking these roads to avoid rush hour traffic.

Foster and appellant eventually ended up on the "Oakdale Highway," and just a couple miles from Calaveras, when Foster's truck broke down. After getting out of the truck to assess the problem, Foster realized that he had accidentally locked his keys in the truck. Since it was cold and neither Foster nor appellant had a cell phone, they decided to walk to Calaveras, where Foster recalled the presence of a payphone outside of the office. They then proceeded to Calaveras to find the payphone and call for help.

Foster and appellant walked through an opening in the fence that surrounds the Calaveras premises, and eventually came upon the plant. Foster noticed that the plant had changed significantly since he worked there, and could not locate a payphone on the

Calaveras premises. Foster testified that, because it was muddy, he wanted to go inside where it was dry and warm, so he climbed a set of stairs up to a deck in the gold flume. Upon reaching the deck, Foster lay down and went to sleep, asserting that he was tired from walking. Foster recalled seeing many objects in the gold flume, but stated that because the room was not lit, he could not identify any of the objects.

Appellant did not testify.

### **DISCUSSION**

Appellant argues that the failure of the trial court to instruct the jury on the distinct elements of the crime of attempt requires reversal. “The federal Constitution’s Fifth Amendment right to due process and Sixth Amendment right to jury trial, made applicable to the states through the Fourteenth Amendment, require the prosecution to prove to a jury beyond a reasonable doubt every element of a *crime*. [Citation.] Thus, a trial court’s failure to instruct on an element of a *crime* is federal constitutional error [citation] that requires reversal of the conviction unless it can be shown ‘beyond a reasonable doubt’ that the error did not contribute to the jury’s verdict [citations].” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324-325, citing *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Flood* (1998) 18 Cal.4th 470, 492-504.)

Attempting a crime is itself a crime. The crime of attempt occurs when a defendant has the specific intent to commit a crime and performs a direct but ineffectual act towards its commission. (*People v. Kipp* (1998) 18 Cal.4th 349, 376; *People v. Bonner* (2000) 80 Cal.App.4th 759, 764; *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 187; § 21a.) The ineffectual act need not be an element of the underlying offense, but the act must demonstrate an immediate, unambiguous intent to commit the specific substantive crime at issue and it must constitute an immediate step towards the execution of that crime. (See *Hatch, supra*, at pp. 187-188; *People v. Jones* (1999) 75 Cal.App.4th 616, 627-628.)

Appellant was charged with a violation of section 487d, which, at the time, provided, “[e]very person who feloniously steals, takes, and carries away, or attempts to take, steal, and carry from any mining claim, tunnel, sluice, undercurrent, riffle box, or sulfurate machine, another’s gold dust, amalgam, or quicksilver is guilty of grand theft and is punishable by imprisonment in the state prison.”<sup>2</sup> The trial court instructed the jury with a modified version of CALCRIM No. 1800, which defined the elements of grand theft, as follows:

“The defendants are charged in Count One with attempted theft of gold dust, amalgam, or quicksilver in violation of Penal Code 487[d]. To prove that a defendant is guilty of this crime, the People must prove that, one, the defendant attempted to take possession of gold dust, amalgam, or quicksilver owned by someone else; two, the defendant attempted to take possession of gold dust, amalgam, or quicksilver without the owners’ or owners’ agent [*sic*] consent; three, the defendant intended to deprive the owner of it permanently; and, four, the attempted taking of the gold dust, amalgam, or quicksilver was from a mining claim, sluice, riffle box, or sulfurate machine. An agent is someone who the owner has given complete or partial authority and control over the owner’s property.”

Although the trial court placed the words “attempt” and “attempted” in this instruction, it never defined the elements of attempt. The crime of “attempt” has a specific legal meaning which is not the dictionary definition of the word “attempt.” The trial court did not satisfy its sua sponte duty to define the technical, legal meaning of attempt to the jury. (*People v. Elam* (2001) 91 Cal.App.4th 298, 306.)

The elements and meaning of attempt are stated in CALCRIM No. 460, which states, in relevant part, that attempt requires the People prove that:

“1. The defendant took a direct but ineffective step toward committing [the offense] [¶] AND [¶] 2. The defendant intended to commit [the offense]. [¶] A *direct step* requires more than merely planning or preparing to commit [the offense] or obtaining or arranging for something needed to

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<sup>2</sup> Section 487d was amended effective April 4, 2011, operative October 1, 2011, to read imprisonment “pursuant to subdivision (h) of Section 1179,” instead of “in the state prison.” (Stats. 2011, ch. 15 (A.B.109), § 370.)

commit [the offense]. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to commit [the offense]. It is a direct movement towards the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt. [¶] A person who attempts to commit [the offense] is guilty of [attempt] even if, after taking a direct step towards committing the crime, he or she abandoned further efforts to complete the crime or if his or her attempt failed or was interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step toward committing [the offense], then that person is not guilty of [attempt]....”

By failing to so instruct, the trial court failed to inform the jury about the elements which would support a conviction for an attempt to commit grand theft of gold dust. Failure to instruct on the essential elements of a charge crime constitutes federal constitutional error. (*People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 324; *People v. Flood*, *supra*, 18 Cal.4th at pp. 492-504.) This error requires reversal of the conviction for attempt to commit grand theft unless it is shown, beyond a reasonable doubt, that the error did not contribute to the jury’s verdict. (*Sengpadychith*, *supra*, at pp. 324-325; *Flood*, *supra*, at pp. 492-504.)

Here, the evidence that appellant attempted to commit grand theft of gold dust is overwhelming. Appellant and Foster were discovered after midnight, hiding in the gold flume at Calaveras. Foster was familiar with the plant, as he had previously worked there. Both men were wearing black clothes, including black beanies and black gloves. An industrial Shop-Vac and seven canvas bags were found near the men. The Shop-Vac had a long hose attached to it, which led to a pile of sand on the ground near inside the sluice. A two-wheeled cart was found behind another building. In other words, appellant and Foster took a number of direct steps beyond planning and preparation and completed all elements of grand theft of gold dust except for the actual taking of the gold dust.

Additionally, both the prosecutor and Foster’s counsel made it clear to the jury in closing that, in order to find appellant guilty of the charged crime, it had to find that he

intended to take gold dust from Calaveras and that he had undertaken some affirmative steps toward carrying out that intent.

The court's error in failing to instruct the jury on the elements of attempt was therefore harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

#### **DISPOSITION**

The judgment is affirmed.